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No. 73-1363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

J. WEINGARTEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR J. WEINGARTEN, INC.

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
QUESTION PRESENTED	3
STATEMENT	3
I. The Board's Findings of Fact	3
II. The Board's Conclusion and Order	9
III. The Decision of the Court of Appeals	10
SUMMARY OF ARGUMENT	11
ARGUMENT	13
I. The Act Does Not Create The Right Of An Employee To Demand The Presence Of His Union Representative At An Investigatory Interview Even Where The Employee Reasonably Believes That The Interview May Result In Disciplinary Action.	13
II. Acknowledgment Of An Employer's Right To Conduct An Investigatory Interview Without The Presence Of A Union Representative Is Not Inconsistent With Industrial Conditions.	18
III. The Arguments Asserted To Support A Statutory Right Of An Employee To Refuse To Be Interviewed At An Investigatory Interview Without Union Representation Where The Risk Of Discipline May Result Are Lacking In Merits.	21
IV. The Criteria Established By The Board Which Activates The Claimed Statutory Right Of Representation Is Vague And Subjective.	26
CONCLUSION	29

AUTHORITIES CITED

Cases

American Can Co., 57 LA 1063 (1971)	19
American Shipbuilding Co. v. N.L.R.B., 380 U.S. 300 (1965)	15
Bethlehem Steel Corp., 47 LA 1082 (1966)	19

	Page
Bethlehem Steel Corp., 55 LA 994 (1970)	19
Chevron Oil Co., 168 NLRB 574 (1967)	23
Dayton Typographical Service, Inc., 176 NLRB 357 (1969)	28
Dobbs Houses, Inc., 145 NLRB 1565 (1964)	22
Emerson Electric Co., 185 NLRB 346 (1970)	28
Escobedo v. *State of Illinois*, 378 U.S. 478	24
Illinois Bell Tel. Co., 192 NLRB 834 (1970)	23
Independent Lock Co. of Ala., 30 LA 744 (1958)	19
Jacobe-Pearson Ford, Inc., 172 NLRB 84 (1968)	23
Lafayette Radio Electronics, 194 NLRB 491 (1971)	24
Masonite Corp., 54 LA 633 (1970)	19
Miranda v. *Arizona*, 384 U.S. 436 (1966)	24
Mobil Oil Corp., 196 NLRB 1952, *enf'd denied*, 482 F.2d 842 (7th Cir. 1973)	10, 11, 15, 17, 26, 32
National Can Corp., 200 NLRB No. 156 (1973)	9
Naval Air Rework Facility, 54 LA 307 (1969)	19
E.I. DuPont de Nemours & Co., 29 LA 646 (1957)	19
Proto Tool Co., 46 LA 486 (1966)	19
Quality Mfg. Co., 195 NLRB 197, *enf'd denied*, 381 F.2d 1018 (4th Cir. 1973), *certiorari granted* April 29, 1974, No. 73-765	2, 10, 16, 17, 24, 26
Ross Gear and Tool Co., 163 NLRB 1012 (1945) *enf'd denied*, 158 F.2d 604 (7th Cir. 1947)	21
South Central Bell Tel. Co., 59 LA 134 (1972)	19
Texaco, Inc., Houston Producing Div., 168 NLRB 361 (1967)	25
Texaco, Inc., Houston Producing Division v. *N.L.R.B.*, 408 F.2d 142 (5th Cir. 1969)	10
Texaco, Inc., Los Angeles Sales Terminal, 179 NLRB 976 (1969)	28
U.S. v. *Wade*, 388 U.S. 218 (1967)	24
United Airlines, 28 LA 179 (1956)	19
Wald Mfg. Co., 176 NLRB 839, *aff'd*, 426 F.2d 1328 (6th Cir. 1970)	28
Western Electric Co., Hawthorne Works, 198 NLRB No. 82 (1972)	9, 31

	Page
Statutes	
Bankruptcy Act (47 Stat. 1481, 11 U.S.C. § 205(p) and (q))	14
National Industrial Recovery Act (48 Stat. 198, 15 U.S.C. § 707(a))	14, 17
National Labor Relations Act of 1935 (49 Stat. 449)	14, 17
National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, et seq.)	2
Section 7	2, 10, 11, 13, 15-18, 21
Section 8(a)(1)	2, 9, 22-25
Section 9	2
Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. § 102)	14, 17
Railway Labor Act (44 Stat. 577, 45 U.S.C. § 152)	13
Railway Labor Act (48 Stat. 1195)	14
Miscellaneous	
Brodie, Union Representation and the Disciplinary Interview, 15 B.C. Ind. Comm. L. Rev. 1 (1973)	19
Comment, *Union Presence in Disciplinary Meetings*, 41 U. of Chi. L. Rev. 329 (1974)	19
Cox, The Right to Engage in Concerted Activities, 26 Ind. L. J. 319 (1951)	14
B. Crane & R. Hoffman, Successful Handling of Labor Grievances, (1956)	19
Getman, Protection of Economic Pressure by § 7 of The National Labor Relations Act, 115 U. of Pa. L. Rev. 1195 (1967)	16
H. Rep. No. 1147, 74th Cong., 1st Sess.	14
B. Meltzer, Labor Law: Cases, Materials, and Problems, (1970)	16
S. Rep. No. 573, 74th Cong., 1st Sess.	18

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-7A)[1] is reported at 485 F.2d 1135. The National Labor Relations Board's Decision and Order are reported at 202 NLRB No. 69 (Pet. App. 9A-30A).

JURISDICTION

The judgment of the court of appeals (Pet. App. 8A) was entered on October 9, 1973, and the Board's time for filing a petition for writ of certiorari was extended by Mr. Justice Powell on December 29, 1973 to and including March 8, 1974. The petition was filed on that date and was granted

[1] "Pet. App." refers to the Appendix to the petition for a writ of certiorari. "A." refers to the single Appendix before this Court.

on April 29, 1974 (A. 101).[2] This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Portions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) relevant to the questions presented before this Court are as follows:

> "*Section 7.* Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> "*Section 8.(a)* It shall be an unfair labor practice for an employer—
>
> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .
>
> "*Section 9.(a)* Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment. . . ."

[2] By order of this Court, this case is set for oral argument in tandem with *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co. and National Labor Relations Board,* No. 73-765, which presents an analogous issue.

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to refuse an employee's request for the presence of his union representative at an investigatory interview with the employer where the employee reasonably believes that the interview will adversely affect his continued employment or working conditions.

STATEMENT

I. The Board's Findings of Fact

The relevant findings of the Administrative Law Judge were adopted by the National Labor Relations Board. These are summarized as follows:

For a number of years J. Weingarten, Inc. (the Respondent) has maintained a collective-bargaining relationship for its Houston area retail grocery stores with the Retail Clerks Local Union No. 455, Retail Clerk's International Association, AFL-CIO (the Union) for its various sales personnel (Pet. App. 14A, A. 22-23).[3]

[3] The last agreement between Respondent and the Union applicable to such employees was entered into on September 9, 1971, effective through September 9, 1974. The contract contains the following pertinent provisions:

In past years each of the Respondent's stores contained a lunch department; but in recent years, as new stores were opened, lobby departments, a new type of operation,[4] were installed in lieu of lunch departments (Pet. App. 14A; A. 23, 80-82).

"ARTICLE IV — DISCHARGE AND DISCRIMINATION

• • •

"B. An employee may be discharged for proper cause, and the Employer shall give notice in writing of such discharge to the Union. The Employer shall not discharge any employee without proper cause and shall give at least one (1) written warning notice of the specific complaint or complaints against such employee to the employee and to the Union, except no warning notice need be given to an employee, before discharge, if the cause of such discharge is dishonesty . . .

• • •

"ARTICLE XVIII — DISPUTE PROCEDURE

"A. The Union shall have the right to designate store stewards for each store.

"B. Should any differences, disputes, or complaints arise over the interpretation or application of the contents of this Agreement, there shall be an honest effort on the part of both parties to settle such promptly through the following steps:

Step 1. By conference between the aggrieved employee and/or store steward, Union business representative, or either, and the manager of the store.
Step 2. By conference between the Union business representative and/or store steward and the District or Zone Manager.
Step 3. By conference between an official of the Union and the President of the Employer or his designate.
Step 4. In the event the last step fails to settle satisfactorily the complaint, it may be referred to arbitration by either party. . . ."

[4] The lobby departments contained a greater variety of specialty items and involved more complicated food preparation equipment, presenting a different sale format to the public as well (A. 80-82).

Leura Collins was employed by the Respondent in 1961 to work in its Store No. 2; this store was equipped with a lunch department. While working in the lunch department of this and other stores similarly equipped, she received a free lunch for each day on which she worked (Pet. App. 17A; A. 30-31, 38-39). During October, 1970, however, Collins was transferred to one of the Respondent's new stores: Store No. 98, which contained a lobby department. No free lunches were provided for employees working in these lobby departments (Pet. App. 17A; A. 30, 39, 83-84; Respondent's Exhibit No. 2(b), A. 84). Unknown to representatives of the Respondent, Collins and other employees employed in the lobby department of Store No. 98 were availing themselves of free lunches each day, in derogation of the policy to the contrary[5] (Pet. App. 17A; A. 70, 72-73, 75).

In June of 1972, Don Hardy, Loss Prevention Specialist for the Respondent,[6] was assigned by his supervisor, Hal

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[5] Respondent introduced evidence to the effect that prior to opening of a new store, a management official conducts an indoctrination course for the employees of each department, at which it is his duty to inform employees of the provisions of the Respondent's manual which provides that employees purchase such items as milk and cookies for lunch while off the clock and that such items must be consumed in designated lunch areas, with the purchase receipts retained by the employees. Collins testified that she did not attend such a meeting, and no evidence was introduced that such provision in the Respondent's manual was brought to her attention (Pet. App. 17A-18A).

[6] The Respondent employs persons classified as "Loss Prevention Specialists," to guard against losses due to dishonesty (Pet. App. 16A). Hardy, who had three years' prior experience in loss prevention activities with a related retail grocery company, had no supervisory status, had no authority to discharge any employee, and had no authority to make recommendations concerning discipline. He carried no sidearm, was not connected with any constituted authority of law enforcement, and was operating under instructions to terminate any investigation or interview if the subject demanded it (A. 50-52).

Burnett, to observe activities of Collins in the lobby department of Store No. 98 (Pet. App. 18A; A. 53).

After receiving instructions to investigate a complaint that Collins was taking money from the cash register, Hardy spent approximately two days observing activities in the lobby department, but did not notice anything to indicate dishonesty on the part of anyone. Following his observations, Hardy introduced himself to the Store Manager, Joe York, who related to Hardy that one of Collins' fellow employees, Jewell Moody, had told York that she had observed Collins purchasing a box of chicken which sold for $2.98 for which Collins had only paid $1.00 (Pet. App. 18A; A. 53-54, 68-69).

Hardy and York, after lunch, requested Moody to come to an area of the second floor in the employees' lounge.[7] Moody repeated her observations of the previous day regarding Collins and returned to work; York then requested Collins to come to the same location (Pet. App. 18A; A. 53-54, 68-69).

Before Collins came upstairs, Hardy and York moved away from York's desk toward the center of the area used primarily as the employee's lounge. When she arrived no other employees were in the area, and she was introduced to Hardy as a representative of the Respondent's security office (Pet. App. 18A-19A; A. 54-55). After he introduced Hardy to Collins and indicated to her that Hardy wanted to talk to her about some matters, York remained as a witness (Pet. App. 18A-19A; A. 55, 69).[8]

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[7] The employees' lounge was located above the store in an open, non-partitioned area (A. 54, 68).

[8] Joe York is a supervisor within the meaning of the Act but had no authority over the discipline of employees in cases involving theft (A. 74).

Hardy began questioning Collins to determine if she had purchased chicken from the Store on the previous day, and she replied that she had. He made inquiry if she had paid full price for the chicken; Collins replied that she had received a dollar's worth of chicken and paid Jewell Moody for it (Pet. App. 19A; A. 33-34, 56-57, 69). Mrs. Collins then stated, "Shouldn't the Union be in on this?" (A. 56, 70). York replied that it was a private matter between the Respondent and Collins and that he believed it would be better to keep the matter between only the three of them because they were "just trying, you know, asking questions and maybe clear up the matter." (A. 56, 59-60, 70).

In response to questioning by Hardy, Collins explained that she purchased chicken valued at a dollar but because the store was out of small size boxes, the chicken was placed into a larger box normally used when a greater quantity was purchased (Pet. App. 19A; 56-58). Further, Hardy asked Collins if she had ever taken any money from the cash register or placed money from the sale of an item into her pocket rather than into the cash register; Collins denied that she had ever done so (A. 62-63). Following Collins' reply concerning these questions, Hardy left the interview to question Moody concerning the inventory of smaller size boxes. Upon confirmation of Collins' statements, Hardy returned to the employees' lunch room area and advised Collins of the verification and that the inquiry was closed (Pet. App. 19A; A. 56, 69-70).

Collins, after receiving Hardy's assurances that the matter was concluded, became emotional and declared that she had never taken anything from the Respondent without paying for it except for the free lunches she was receiving in the lobby department (Pet. App. 20A; A. 35, 57, 70). Hardy then questioned York if it was true that employees

in the lobby department received free lunches, and York replied that under the Respondent's policy they did not. Both Hardy and York expressed their surprise that employees were receiving free lunches and questioned Collins about the practice, the frequency with which she got such lunches, the types of food that she had received, and the approximate dollar amount of such lunches (Pet. App. 20A; A. 34-35, 57, 71).

Hardy began to prepare a statement, but upon Collins' firm insistence that free lunches were legitimate, he telephoned his supervisor, asking him to determine if employees were permitted to receive free lunches. While Hardy was on the telephone, Collins asked York, "Couldn't I have Billy Brockett [the Union Steward] present?" York then replied, "Well, Leura, you know, it's still basically a private conversation between us, and we are just trying to clear up some matters." (A. 57-58, 71-73).[9]

Returning from the telephone conversation, Hardy continued to question Collins about the frequency of lunches. She informed York that she would not sign any statement. Meanwhile, Hardy received a telephone message from

[9] The Decision and Findings of the Administrative Law Judge, pertinent to this part, were as follows:

> "Both Hardy and York testified that Collins did not ask for Union representation during the questioning, but only asked shouldn't someone from the Union be here, and that had she in fact requested such representation during the questioning, the interrogation would have been promptly terminated. I do not regard this as a conflict in testimony. Even assuming that Collins used the words Hardy and York attributed to her, while perhaps not quite as articulately expressed as by one more fluent in the English language, it was in her way of expressing herself, a request that a representative of the Union be present during her interrogation, and York's reply that he did not regard this as necessary was legitimately understood by her to be a denial of her request." (Pet. App. 20A).

Burnett to the effect that he had been unable to ascertain what the practice was at Store No. 98, but that in some stores employees received free lunches and in others they did not (Pet. App. 21A; A. 58, 72).

Hardy did not ask Collins to sign any statement and had not finished typing the document when he removed it from the typewriter (A. 59).[10]

Hardy and York thanked Collins for her time during the interview and asked her if she desired to take the rest of the day off, and she replied that she did. York allowed Collins to take off the remainder of the day, and Collins received four hours time for the afternoon. At the conclusion of the interview, York again stated to Collins that he considered the matter to be confidential between her and the Respondent and that no one would know about the interview unless Collins advised them (Pet. App. 21A; A. 59).

II. The Board's Conclusion and Order

Before the full Board, the decision and order of the Administrative Law Judge that a violation of Section 8(a)(1) had occurred was affirmed, with members Kennedy and Penello dissenting.[11]

Thus, the Board adopted the proposed order of the Administrative Law Judge that the Respondent cease and

[10] Hardy followed his practice of preparing statements of persons interviewed regardless of whether or not they were being interviewed concerning their guilt or innocence in a particular investigation (A. 63-64).

[11] Member Penello voted to dismiss the Section 8(a)(1) allegation because the Respondent was conducting an investigatory rather than a disciplinary investigation, citing *Western Electric Co., Hawthorne Works*, 198 NLRB No. 82 and *National Can Corp.*, 200 NLRB No. 156 (Pet. App. 10A).

desist from requiring any employee to take part in an interview without union representation, where such representation had been requested by the employee and where the employee had reasonable ground to believe that the matters to be discussed may result in disciplinary action (Pet. App. 28A). The Board's decision followed its prior decisions in *Mobil Oil Corp.*, 196 NLRB 1052, *enforcement denied*, 482 F.2d 842 (7th Cir. 1973), and *Quality Mfg. Co.*, 195 NLRB 197, *enforcement denied*, 481 F.2d 1018 (4th Cir. 1973), *certiorari granted* April 29, 1974, No. 73-765 (A. 101).

III. The Decision of the Court of Appeals

The court of appeals for the Fifth Circuit denied enforcement of the Board's order, although concluding that Collins adequately raised the question of union representation. The court of appeals found that there had been no suggestion that the meeting was anything other than a preliminary fact-finding interview, and there was no evidence that the Respondent sought to deal with Collins about the consequences of her alleged misconduct (Pet. App. 5A). The court observed that, in addition to the Board's own precedent, its earlier decision of *Texaco, Inc., Houston Producing Division* v. *NLRB*, 408 F.2d 142 (1969), wherein the court found no statutory requirement for union representation at an investigative interview, was binding precedent. The court, in addition to adopting language from the Fourth Circuit Court of Appeals in *Quality, supra*, declared:

> "While a basic purpose of Section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, such a need does not arise at an investigatory interview. To extend the scope of the Act's protection to such preliminary contacts between an employee and his employer would be to apply an overbroad interpretation to Section 7. We follow the Seventh Circuit's decision in *Mobil, supra*, but we find it unnecessary at this time to approve or disapprove that portion of the opinion . . . which placed great emphasis on the economic pressure function of Section 7. We believe that an investigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment." (Pet. App. 7A).

SUMMARY OF ARGUMENT

I.

The decision of the court of appeals should be affirmed because it properly construes the purpose and scope of the Act.

Legislative history evidences an attempt to balance bargaining relationships through the avenues of economic pressure, and collective bargaining rights are the subject of the main theme of the Act. Legitimate expressions of business concern by employers cannot be characterized as violations of the Act by mere Board edict but must fall within the specified prohibitions of the Act, as illuminated by legislative history and judicial interpretation.

No clear legislative basis has been raised to justify the claimed statutory right of an employee to insist upon union representation at an investigatory interview, even where disciplinary action may result. The Board has not been granted blanket authority to prohibit labor practices that in its opinion are deemed to be unfair or unwise.

II.

Economic factors in industrial life are present to permit the creation of the right to representation for employees in investigative interviews within the well-established bargaining relationships which the Act now protects.

The right sought to be asserted is commonly guaranteed in collective bargaining agreements, negotiated in the environment of economic action, and the use of investigatory interviews without requested union representation has been determined by arbitrators to be within employers' legitimate interests.

The claimed statutory right of participation by union representatives in investigatory interviews should not be founded upon speculative industrial enrichment or wisdom, regardless of how sincere the efforts for such improvement may be.

III.

The vague and often-times ambivalent positions of the Board in defining the limits of proper interviews by employers is further obscured by its present theory. Its previous distinction between disciplinary and investigatory interviews, regardless how arbitrary, provided security and a degree of exactness for employers in the evaluation of the conduct under the Act.

The *ad hoc* reversal of its prior precedents without legislative or judicial support warrants the conclusion that the Board's current argument is without sound statutory support. The Board's decision recharacterizes the purpose and scope of fact-finding, investigatory interviews to cause them, in narrow circumstances, to be violative of the Act on an unexplained statutory basis.

IV.

The Board leaves no reliable standards for employees and employers to avoid engaging in unlawful conduct under its current reasoning.

It causes all concerned to act at their peril and to await subsequent administrative examination of the quality and sufficiency of the employee's apprehension of possible adverse employment consequences which might result from an investigatory inquiry should requested union representation be denied.

ARGUMENT

I. THE ACT DOES NOT CREATE THE RIGHT OF AN EMPLOYEE TO DEMAND THE PRESENCE OF HIS UNION REPRESENTATIVE AT AN INVESTIGATORY INTERVIEW EVEN WHERE THE EMPLOYEE REASONABLY BELIEVES THAT THE INTERVIEW MAY RESULT IN DISCIPLINARY ACTION.

The Board has failed to articulate the statutory basis or the perceptive legislative history which underpins its reliance upon Section 7's alleged confirmation of the right of an employee to union representation at an investigative interview in which the employee reasonably believes may result in disciplinary action. Conspicuously void of any historical, legislative, or judicial precedent, the Board's present theory is precariously fashioned.

History indicates that Section 7 of the National Labor Relations Act was not novel in its enactment.[12]

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[12] Similar declarations, designed to establish and protect the basic rights incidental to the practice of collective bargaining set forth in Section 7, are found in the Railway Labor Act of 1926 (44 Stat. 577, 45 U.S.C. § 152), Norris-LaGuardia Act (47 Stat.

One of the central purposes of the National Labor Relations Act, like that of the Wagner Act,[13] was to counterbalance the economic power of employers by facilitating the use of strikes and other forms of economic pressure by employees.

That the purpose of the Act was to create equality of bargaining power between employers and employees by protecting the exercise of employees' full freedom of association and designation of representatives of their

70, 29 U.S.C. § 102), and the Bankruptcy Act, as amended, (47 Stat. 1481, 11 U.S.C. § 205(p) and (q)).

Section 2 of the Railway Labor Act of 1934 (48 Stat. 1185) provides:

> "The purposes of the Act are . . . (3) to provide for the complete independence of carriers and of employees in the matter of self-organization . . . Employees shall have the right to organize and bargain collectively through representatives of their own choosing . . . No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice. . . ."

Also, Section 7(a) of the National Industrial Recovery Act (48 Stat. 198, 15 U.S.C. § 707(a)), provides that —

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint, or coercion of employers of labor or their agents in the designation of such representatives or in self-organization, or in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 7 of the Wagner Act (49 Stat. 449) reads —

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

[13] "The Wagner Act became law on the flood tide of belief that the conflicting interest of management and worker can be adjusted only by private negotiations, but, if necessary, by economic weapons, without the intervention of law." *Cox, The Right to Engage in Concerted Activities,* 26 Ind. L.J. 319, 322 (1951), See H. Rep. No. 1147, 74th Cong., 1st Sess. 1935); 78th Cong. Rec. 3443 (1934) (Remarks of Senator Wagner).

own choosing is universally accepted. A worker is accorded the right to associate with fellow workers and to join or refrain from joining any labor organization. His helplessness as an individual in the arena of bargaining with his employer for improvements in terms and conditions of employment is recognized. Section 7 seeks to balance the bargaining power of employers and employees by permitting employees to pool their strength.[14]

The Act endeavors to redress this disparate condition in bargaining relationships, but not every employment contract between an employer and an employee was contemplated or intended to be so adjusted.

As the court stated in *Mobil Oil Corp.* v. *NLRB,* 482 F.2d 842 (7th Cir. 1973):

> "The 'central purpose' of the National Labor Relations Act 'was to protect employee self-organization and the process of collective bargaining from disruptive interferences by employees.' *American Shipbuilding Co.* v. *NLRB,* 380 U.S. 300, 317. The basic thrust of § 7 is to enable employees to organize and to apply economic pressure against their employers in appropriate situations. Scholarly analyses of the reach of § 7 devote almost no attention to the language of the section, but instead consider the various situations in which the use of economic pressure by employees is appropriate. In our opinion, economic pressure may properly be applied to compel employers to follow acceptable investigatory procedures, or to determine the consequences of various kinds of misconduct, but economic pressure should not be a component of the fact-finding process itself. The requested Union representation at an investigatory interview is clearly not

[14] 79 Cong. Rec. 2332, Feb. 20, 1935.

> the kind of 'concerted activity' with which § 7 is primarily concerned."[15]

Section 7 of the Act protects the legitimate and legal use of economic pressure by both organized and unorganized employees, and the scheme of the Statute acknowledges the stress which exists "between the policy forbidding an employer to discipline employees for using economic pressure and the policy permitting him to defend his own economic interests."[16]

No controversy exists in this case about the doctrine which declares that the Statute entitles an employee to union representation after the imposition of discipline, but it is said that the analogy is comfortably extended to pre-decisional, investigatory interviews where the employer seeks to interview an employee prior to a determination concerning possible discipline. This extension must rest upon sound statutory ground and not logical artifice.

The Board's decision in *Quality, supra,* admittedly rests solely upon its interpretation of Section 7 of the Act.[17]

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[15] Citing *Getman, Protection of Economic Pressure by § 7 of the National Labor Relations Act,* 115 U. of Pa. L. Rev. 1195 (1967); and *B. Meltzer, Labor Law: Cases, Materials, and Problems,* 892 (1970).

[16] *Getman, supra,* p. 1196 (1967).

[17] The Board's reasoning is manifested in sweeping generalities:

> "After reflection, we have concluded that it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action. And while the employer's denial of such a request may not derrogate the bargaining rights of the union, in violation of Section 8(a)(5), in the case of a purely investigatory interview, this is not to say either: (a) that the employer may discipline the employee for demanding representation; or (b) that the employer may insist, by threatening to discipline the employee's representative, that the interview be held without his presence." (195 NLRB at p. 198).

It is argued that the only course consistent with all the provisions of the Act dictates that participation in the investigative interview must be voluntary; and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence.[18] This proposal of advocacy is a tortured rendition of the Act's design, for all admit that no collective bargaining occurs in the pure investigative interview.

The significance of Section 7 in a context of the investigative interview has been clearly difficult to define heretofore. The legislative history is not particularly helpful to the Board's newly declared position, as is tacitly conceded by the Board by its omission of reference in its brief. The Board's attempt at statutory reliance has been met with judicial coolness.[19]

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[18] *Quality, supra,* 195 NLRB at p. 198.

[19] The "mutual aid or protection" language of Section 7 of the Act received comment from the court in *Mobil Oil Corp., supra,* in footnote 10:

> "The 'mutual aid or protection' language of § 7, 49 Stat. 452, appeared earlier in § 2 of the Norris-LaGuardia Act, 47 Stat. 70, and § 7(a) of the National Industrial Recovery Act, 48 Stat. 198. The same language is also used in § 1 of the National Labor Relations Act, 49 Stat. 449-450, 29 U.S.C. § 151.
>
> "Perhaps due to its earlier usage, the legislative history of the Act reveals no particular concern for the language. Rather, § 7 is spoken of generally: 'The language restrains employer from attempting by interference or coercion to impair the exercise of employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy. A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities.' S. Rep. No. 1184, 73rd Cong., 2d Sess. 4. In introducing his bill, Senator Wagner also spoke in broad terms: 'The national labor relations bill which

Sound application of legislative intent of the Act warrants the conclusion that the Act accomplishes its purpose by preserving basic individual rights concomitant with the collective bargaining relationship and not by cloaking employees with the right to control employer's avenues of gathering information regarding their operations.

II. ACKNOWLEDGMENT OF AN EMPLOYER'S RIGHT TO CONDUCT AN INVESTIGATORY INTERVIEW WITHOUT THE PRESENCE OF A UNION REPRESENTATIVE IS NOT INCONSISTENT WITH INDUSTRIAL CONDITIONS.

Merely because the right to representation at the grievance stage of personnel actions is protected by the Act and the right to union representation at a pre-decisional interview may be guaranteed by contract does not dictate that it is also statutorily conferred. That the right to union representation at an investigative interview is commonly guaranteed by collective-bargaining agreements supports the position that the Act protects the collective economic pressure to secure the right and not the right in iself.

I now propose is novel neither in philosophy nor in content. It creates no new substantive rights. It merely provides that the employees, if they desire to do so, shall be free to organize for their mutual protection or benefit . . . it seeks merely to make the worker a free man in the economic as well as political field. Certainly the preservation of long-recognized fundamental rights is the only basis for frank and friendly relations in industry.' 79 Cong. Rec. 2368. And, the committee report on the bill discussed §§ 7 and 8 together: 'These sections are designated to establish and protect the basic rights incident to the practice of collective bargaining . . . Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair.' S. Rep. No. 573, 74th Cong., 1st Sess. 8."

All agree that many collective-bargaining agreements accord the right of union representation to employees at investigatory interviews whether such interviews are likely to lead to discipline or not. (Board's Brief p. 19).

It is overreaching to conclude, however, that the weight of arbitral authority sustains the right of such representation where contract language is silent even though the employee who is called in for the interrogation may have a reasonable belief that the interview will result in the development of information to be used against him as the basis for discipline. *South Central Bell Tel. Co.*, 59 LA 134, 138 (1972).[20] The conditions of industrial life, acknowledged by arbitrators, admit that the use of employee interviews in the administration of industrial discipline for on-the-job misconduct, production, and order is within the employer's legitimate interest.

The right of participation by union representatives in investigatory interviews at an employee's request cannot rest upon the conjectured benefit or detriment to the employer's interest or the employee's collective bargaining rights. The benefits which may accrue to an employee and the disadvantages to the employer by such practice are purely theoretical and the subject of diverse opinion.[21]

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[20] *Accord: Masonite Corp.*, 54 LA 633, 639 (1970); *Bethlehem Steel Corp.*, 55 LA 994, 995 (1970); *Naval Air Rework Facility*, 54 LA 307, 310 (1969); *Proto Tool Co.*, 46 LA 486, 490 (1966); *Bethlehem Steel Corp.*, 47 LA 1082, 1083 (1966); *Independent Lock Co. of Alabama*, 30 LA 744, 747 (1958); *E. I. DuPont de Nemours & Co.*, 29 LA 646, 652 (1957); and *United Airlines*, 28 LA 179, 180 (1956). Also, *American Can Co.*, 57 LA 1063, 1065 (1971).

[21] Comment, *Union Presence in Disciplinary Meetings*, 41 U. of Chi. L. Rev. 329, 342-344 (1974). *Brodie, Union Representation and the Disciplinary Interview*, 15 B.C. Ind. Comm. L. Rev. 1, 11, 13-15 (1973). There is a belief among some management people that lower level union representation impedes, rather than helps, the settlement of grievances. *B. Crane & R. Hoffman, Successful Handling of Labor Grievances*, 14 (1956).

While it is argued that for a number of years the Board did not recognize the so-called "right of representation," it is evident that the right to act collectively and bargain for such union representation was not deluded by the Board's ambivalent positions. Since the basic thrust of the Act was to equalize the bargaining strength of the employer and his employees, the context of collective-bargaining for the securing of such a right of representation is the proper framework in which the right may be negotiated for between the parties.

The complexities of industrial life support the contention that it is certainly speculative that such a right of representation would insure either the full, truthful version of any occurrence, the presentation of an understandable story, less serious disciplinary action, or guard against overreaching management decisions. It may be stated, moreover, that the presence of union representation may have a detrimental effect upon a genuine fact-finding process, especially where employees are questioned concerning their fellow employees' involvement in questionable conduct.

The nature of an investigative interview does not permit a single, simple generalization as to the beneficial or detrimental effects of conferring the right of union representation upon employees who may request it. The purpose of the interview may vary, the individuals being interviewed may differ, and a variety of incidents may give rise to such an interview.

Regardless of how noble the considerations involved in arguing that such representation is industrially wise, the announcement of the right to representation at an investigatory interview must be founded upon the Statute's language. To do otherwise would attack the firm foundation upon which labor relations are anchored.

III. THE ARGUMENTS ASSERTED TO SUPPORT A STATUTORY RIGHT OF AN EMPLOYEE TO REFUSE TO BE INTERVIEWED AT AN INVESTIGATORY INTERVIEW WITHOUT UNION REPRESENTATION WHERE THE RISK OF DISCIPLINE MAY RESULT ARE LACKING IN MERITS.

The question concerning the existence of a statutory right of an employee to have union representation at an investigative interview is neither novel nor exclusive to this case. What is novel, however, is the Board's present rearranging of employer-employee relations by its "considered" opinion that a statutory right does exist in particular cases.

In *Ross Gear & Tool Co.*, 63 NLRB 1012, 1034 (1945), *enforcement denied*, 158 F.2d 604, 611-614 (7th Cir. 1947), the Board concluded that the employer violated Section 7 of the Act by denying an employee the right to have her union representative present and by discharging her for refusing to come to an investigatory interview alone.[22] The court of appeals denied enforcement, stating:

> "Assuming that an employee has a right to be represented by the union in a discussion or a presentation of a labor grievance with an employer, such a right

[22] Although the Board cited no legislative history or prior precedent, it declared:

> "Assuming, without deciding, that an individual employee is entitled to insist upon union representation whenever he or she may be called in by management to be admonished, in the instant case Ford was being called in partly as a member of a union committee about a matter concerning which the respondent had already dealt with that committee as the exclusive bargaining representative . . . Therefore, Strecker's [the employer] order, directing Ford to come along on penalty of discharge, interfered with, restrained, and coerced Ford in the exercise of the rights guaranteed in Section 7 of the Act and hence was unlawful." (63 NLRB at p. 1033-1034).

did not exist in the instant case. This is so, in our view of the matter, because there is no basis for the contention that such a grievance was involved."

Prior to the Board's next pronouncement that an employer's refusal to permit union representation for an employee during a discharge conversation was not violative of the Act,[23] the General Counsel of the Board refused to issue complaints against employers for refusing to recognize the right of representation of employees prior to the issuance of discipline.[24]

Adopting a broader view, the Board found a violation of Section 8(a)(1) of the Act where an employer refused union representation to an employee and where the Board found that the purpose of the meeting was not solely to provide information but rather to conclude a case of evidence already known. The employer was ordered to cease and desist from refusing "any employee . . . [the right] to be represented by such labor organization at any meeting convened by the employer by which the employee is questioned about . . . [his activities] where such employee

[23] *Dobbs Houses, Inc.*, 145 NLRB 1565, 1570-1571 (1964), where the Board adopted the findings of a Trial Examiner who held:

"I failed to perceive anything in the Act which obliges an employer to permit the presence of a representative of the bargaining agent in every situation where an employer is compelled to admonish or otherwise take disciplinary action against an employee, particularly in those situations where the employee's conduct is unrelated to any legitimate union or concerted activity. An employer undoubtedly has the right to maintain day-to-day discipline in the plant or on the working premises and it seems to me that only exceptional circumstances should warrant any interference with this right. . . ."

[24] *Administrative Rulings of the NLRB General Counsel*, 37 LRRM 1076 (Case No. K-71) Oct. 10, 1955 and *Administrative Decision of the NLRB General Counsel*, 1962 CCH NLRB ¶ 11,991 (Case No. SR2382) Dec. 7, 1962.

requests representation at the meeting by said labor organization."[25]

Ten short days later, the Board issued a decision which adopted a Trial Examiner's dismissal of Section 8(a)(1) allegations raised by the Counsel for the General Counsel that the right to representation by a union at a fact-finding meeting was proper because there was an "inchoate" grievance and the lack of union presence offended the statute.[26]

The Board has previously recognized that an employee's right to union representation does not apply to pre-decisional meetings held essentially to gather information where the potential discipline is "too remote."[27]

[25] *Texaco, Inc., Houston Producing Div.*, 168 NLRB 361, 363, (1967), enfd denied 408 F.2d 142 (1969).

[26] The Trial Examiner noted in his decision —

"He [General Counsel] further contends that it is a violation of Section 8(a)(1) for an employer to deprive employees of the advice and counsel of a union representative whenever the *possibility* of disciplinary action may be visited upon them. Translating this thesis into their applicability to the instant proceedings, the General Counsel argues that the employees here involved possess the right to union representation at the April 4 factfinding meetings because an 'inchoate' grievance was in the making. . . .

"To be sure, Section 7 of the Act guarantees employees the right to be represented by their collective-bargaining representative in all areas pertaining to their terms and conditions of employment, and the penalty of suspension from work for alleged insubordination most assuredly is encompassed within those terms and conditions . . . But this is not to say that a bargaining agent must be privy to management councils or that represented employees must be shielded by that agent from company inquiries, on each and every occasion when management embarks upon an investigation to ascertain whether plant discipline has been breached." *Chevron Oil Co.*, 168 NLRB 574, 578 (1967).

[27] *Jacobe-Pearson Ford, Inc.*, 172 NLRB 84 (1968). *Illinois Bell Tel. Co.*, 192 NLRB 834 (1971), where the Board affirmed the following decision by the Trial Examiner:

"Although the Union, in its brief, makes an appealing argument that the right of union representation should be afforded even in the investigatory stage in those cases involving misconduct which could result in criminal prosecution, I find no basis in the authorities above cited for maintaining such a distinction."

Prior to its decision in *Quality, supra,* the Board found no violation of Section 8(a)(1) where an investigatory interview, even though it might have resulted in discipline, did not go beyond the fact-finding stage.[28]

Thus even until 1971, the Board's disciplinary/investigatory dichotomy continued to receive its support.[29]

The same contention made by the General Counsel in *Lafayette Radio Electronics*[30] is made by the Board in the case at bar:

> "But General Counsel argues for a violation on a broader concept than that presented by the fact-finding versus disciplinary concept. According to General Counsel, the employees were in need, and entitled to, union representation, because '. . . the interrogations

[28] *Emerson Electric Co.,* 185 NLRB 346, 347 (1970); *Dayton Typographical Service, Inc.,* 176 NLRB 357, 361 (1969); *Texaco, Inc., Los Angeles Sales Terminal,* 179 NLRB 976 (1969); *Wald Mfg. Co.,* 176 NLRB 839, 846 (1969) *affirmed on other grounds,* 426 F.2d 1328 (6th Cir. 1970), where the Board approved the decision of the Trial Examiner who declared:

> "The union has a statutory right to be present at the *adjustment* of grievances, but to permit it to insist on attending every routine interview which might culminate in discipline goes beyond the statute and could disrupt personnel practices in a large plant."

[29] *Lafayette Radio Electronics,* 194 NLRB 491, 492 (1971), where Members Fanning, Jenkins, and Kennedy adopted the following language of the Trial Examiner:

> "From the grist of the *Texaco* case and those cases which have considered the issue, the principle appears to have evolved that the right to union representation exists if the purpose of the meeting between the employee and management is disciplinary; but that the union has no right to be present if the purpose of the meeting is fact-finding or investigatory."

[30] The Board has specifically rejected the contentions that the right of representation is analogous to this Court's decision in *Escobedo* v. *State of Illinois,* 378 U.S. 478 and *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and *U.S.* v. *Wade,* 388 U.S. 218 (1967).

> in circumstances here were also reasonably calculated to prejudice any future grievances as to the 'cause' for any subsequently imposed discipline because the interrogations were for the purpose of extracting detrimental admissions or confessions. Accordingly, any such interrogations tend to render futile any future grievances concerning the 'merits' of the employee's case and would virtually restrict any meaningful contentions related to the subject of the measure of discipline." (194 NLRB at p. 494.)

That the Board has permitted the right of union representation to be conditioned and become subject to collective-bargaining agreements further confuses the issue.[31] In *Western Electric* the issue was squarely presented. The respondent admitted that it had regularly and systematically excluded representation, despite requests for such representation both from employees and the union during investigatory interviews which, in a number of cases, resulted in disciplinary action. Sustaining the respondent's motion for summary judgment that such exclusions did not, as a matter of law, transgress the Act, the Board dismissed the allegations that the employer violated Section 8(a)(1) of the Act. In *Western Electric,* grievances were submitted to arbitration on behalf of two employees who were disciplined following an investigation into their alleged misconduct. In both cases the employees were required to submit to investigatory interviews without a union representative being present, and the union grieved over this refusal. An arbitration board, convened under the contract between the union and the company, ruled that employees did have a right under the agreement to the presence of a union representative at disciplinary confer-

[31] *Western Electric Co.,* 198 NLRB No. 82 (Aug. 1, 1972).

ences but not at investigatory interviews. Members Penello and Kennedy, along with Chairman Miller, constituted a majority of the Board in dismissing the case based upon their decision "paralleling those expressed by Member Kennedy's dissents in *Quality Mfg.* and *Mobil Oil Corp.*" Chairman Miller, joined in dismissing the allegations, but for different reasons, namely: That where collective-bargaining agreements establish channels for the exercise of employee rights, the Board has traditionally refrained from attempting to regulate or interfere with such arrangements so long as they are consistent with the statutory scheme of the Act, viewed as a whole.

This reasoning would seem to warrant the conclusion that contractual language can bar an employee's claimed statutory right to representation at investigatory interviews.

IV. THE CRITERIA ESTABLISHED BY THE BOARD WHICH ACTIVATES THE CLAIMED STATUTORY RIGHT OF REPRESENTATION IS VAGUE AND SUBJECTIVE.

It is stated that the Board's "special function" of reforming its standards on the basis of accumulated experience gives additional validity to the Board's conclusion that the Act protects an employee from compulsory attendance, without union representation, at an investigatory interview where discipline may result. None would declare that the matter before the Court is isolated or new. The Board's novel position realigns and reverses its earlier decisions, claiming a statutory right where none was previously found to exist. This changed position not only does not find

support in precedent or statutory history but also places employers and employees in perilous positions."[32]

A union's position in such an interview is largely undefined. To follow the Board's logic, if a union is permitted to represent the employee as the exclusive bargaining representative, it is logical to assume that the employer must deal through this representative and that any attempts to bypass the union would also be violative of the Statute.

Apparently, employee misgivings must trigger the claimed statutory right, and investigatory interviews are recharacterized as adversary confrontations where employees are placed under a cloud of suspicion. To declare that the statutory right arises only when an employee has reasonable grounds to believe that the interview might result in discipline is even more arbitrary than to declare the right exists at all.

This line of argument leaves serious doubts for both employers and employees. For employers, the proper denial of requested representation rests not upon its intent or purpose but rather upon the state of mind of the questioned employee. For employees, the proper insistence upon

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[32] Member Kennedy in his dissent in *Mobil Oil Corp., supra,* on p. 1054, speaks to this matter when he indicated —

> "No explanation is given as to how and at what point in the interview, or before, reasonable grounds for fear came into being. In my view, only by perception of the nature of events after they happened can it be said that Burnett and Smith had 'reasonable grounds' for concern about their continued employment. The Employer certainly was not in a position at the investigatory interview to read employees' minds and determine their mental state. This being so, the conclusion that the Employer is guilty of an unfair labor practice must be based on something other than the Employer's acts and conduct, namely, the state of mind of the employees, a purely subjective consideration."

representation entitled to protection under the Act will be judged by reasonableness of apprehension under the circumstances. A set of qualifying conditions could hardly be more confusing or vague.

No firm footing for conducting investigative employee interviews with assurance of lawfulness remains under the Board's present pronouncement. No clear claimed right of representation can be seized by employees when confronted by his employer's questions.

The Board's position destroys the clear separation between investigatory and disciplinary interviews and seeks to create a claimed right of dubious origin with unclear parameters. To adhere to this argument would leave industrial relations in chaotic shambles.

Attempts to justify the asserted right to representation in investigatory interviews where discipline may result have no support in statutory framework but rely upon speculative industrial benefits. The Act balances bargaining power between employees and employers; it does not prohibit employers seeking information concerning the work activities of their employees even where discipline may result.

No bargaining relationship or disciplinary atmosphere is created in a fact-finding interview, and no need for bargaining representation arises where no accusations arise and where the employee may remain silent in the face of such questioning.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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